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Supreme Court of the United States

October Term 1985

TXO PRODUCTION CORP.,

Petitioner,

v.

ALLIANCE RESOURCES CORP., TUG FORK LAND COMPANY, GEORGE KING, AND GROVER C. GOODE,

Respondents.

On Writ of Certiorari to the
Supreme Court of Appeals
of West Virginia

BRIEF OF CENTER FOR AUTO SAFETY
AS AMICUS CURIAE IN
SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the Court should modify its decision in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032 (1991) and adopt a constitutionally fixed ratio between compensatory and punitive damages as a means of limiting the size of punitive damage awards generally?

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BRIEF FOR CENTER FOR AUTO SAFETY AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST

The Center for Auto Safety (CAS) is a non-profit corporation based in Washington, D.C. The CAS is committed to motor vehicle safety and to the support nationally of measures that will reduce death, personal injury and economic loss on the highways. An important CAS concern is the promotion of legal standards that effectively and fairly deter automobile and truck manufacturers — domestic and foreign — from marketing vehicles that are unsafe in design. Because the decision in this case will have a significant impact on the interests of automobile and truck users in this country, the CAS believes that its views on the deterrence role of punitive damages in product liability litigation would be of assistance to the Court.

Letters from the parties consenting to the filing of this brief have been filed with the Clerk of this Court as required under Supreme Court Rule 37.3.

INTRODUCTION AND SUMMARY OF ARGUMENT

CAS will rely on the statement of facts set forth in Respondents' brief. It will argue three points. First, the rationale and holding of *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991) are fundamentally sound and should be retained. There is no constitutional justification for supplementing *Haslip* with a judicially fixed ratio test which bases punitive damages *exclusively or predominantly* upon the amount of compensatory damages awarded. The propriety of any punitive damages verdict is a question of evidentiary sufficiency which must be judged on a case-by-case basis in light of each state's governing legal standards. Second, to decide whether an award of punitive damages is excessive within the *Haslip* framework, an appellate court should consider: (1) the evidence and arguments actually advanced *at trial* concerning the award of punitive damages, including those relating specifically to the the amount of the award; (2) the extent to which defendants in litigating the punitive damages issue took full advantage of all available procedural safeguards *at trial*, particularly the right to bifurcate; and (3) the extent to which the defendant's case at the appellate level rests on arguments and data *not* presented to the jury or to the trial judge. Third, CAS will profile a major product liability case involving defective gas tank placement to illustrate why the West Virginia standards for awarding punitive damages are not merely rational in the substantive due process sense, but serve *compelling* social goals when applied to a wrongdoer who acts with: (1) the intent to do serious harm or with an awareness of the potentially serious consequences of the wrongdoing: (2) an expectation of deriving profit from the wrongdoing; and (3) the understanding that

its social, political or economic standing would make it difficult for a victim of such wrongdoing to gain effective legal redress. Under a judicially fixed ratio test, punitive damages cannot adequately deter in such cases.

ARGUMENT

When this Court ruled in *Haslip*, it recognized that the award of punitive damages poses a marginally greater risk of error than is inherent in other fact finding functions traditionally assigned to the jury. *Haslip* did not constitutionalize punitive damages standards. Instead, the Court stressed the importance of the *procedural* structure within which the trial jury is asked to calculate punitive damages. Accepting Alabama's *general* standards for awarding punitive damages as constitutionally valid, the Court found the safeguards surrounding such awards adequate to protect civil defendants from arbitrary or irrational jury decisionmaking. Notably, these safeguards were multi-tiered; they applied not only to the conduct of the jury trial itself but to post trial and appellate review as well. *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1042-45 (1991).

In CAS's view, Petitioner ultimately seeks to transform *Haslip* from a procedural to a substantive due process holding. Supported by many of the amicus briefs, Petitioner argues that *Haslip*, barely two years old, is unworkable because of its "unpredictability" and the persistence of jury verdicts "run wild". Throughout Petitioner's brief, there is a consistent emphasis is on a single factor formula: the ratio between compensatory and punitive damages.[1] This is a *substantive* due process argu-

[1]Ratios are mentioned repeatedly in the text of Petitioner's Brief. *See, e.g.*, pp. 4, 6, 7, and 8. Appendices A, B and C are similarly designed to highlight the ratio between actual and punitive damages. Petitioner appears to prefer a ratio limit no higher than 4 to 1.

ment and, as such, it is an extraordinary proposition. If adopted, the ratio test — in the interests of increasing predictabiity for the very worst of civil wrongdoers — would diminish to the point of irrelevancy the varied factors now considered pertinent to the determination of punitive damages in West Virginia and in many other states. The cost in some cases would be a severe restriction upon the state's ability to advance the basic goals which punitive damages have long been thought to serve: punishment and deterrence.

Although CAS acknowledges the amount of harm actually inflicted by a civil wrongdoer can and, in some cases, should have a significant bearing on the jury's calculation of punitive damages, a ratio test would tend to overstate the importance of that factor across the board. Paradoxically, it would provide the greatest immunity from sanction to wrongdoers who are the least deserving morally and perhaps the most dangerous.[2] This "protected" class would consist of wrongdoers whose misconduct: (1) poses serious health or safety risks to the public but which happens not to have caused serious harm; (2) has been profitable to the defendant or was believed by the defendant when undertaken to be potentially profitable; or (3) has been committed repeatedly without civil or criminal sanction and which the defendant stubbornly refuses to admit is unlawful. Under traditional due process

[2]In West Virginia as in most jurisdictions, the standard for imposing punitive damages is intentional misconduct or misconduct reflecting an awareness of possible harm — physical or monetary — to third parties. The requirement of a culpable mental state is what distinguishes merely negligent conduct from conduct which shows contempt for or indifference to society's norms. Much conduct justifying the award of punitive damages could, at least in theory, be punished criminally. Civil defendants however, do not face the possibility of incarceration. In challenging punitive damage verdicts as excessive, rarely do they place any monetary value on the avoidance of incarceration.

standards, the imposition of punitive damages against this class of defendants must be regarded as rationally related to the assessment of puntive damages and hence within the power of the states to enact and enforce.[3] Even under heightened substantive due process standards which do not apply to the award of punitve damages,[4] the state possesses a *compelling* basis for imposing monetary sanctions to deter and punish intentional misconduct or misconduct undertaken with an awareness of its potential for harm to others.

Petitioner actually recognizes that on these terms its *substantive* due process argument cannot succeed. The Petitioner argues that case-by-case determination of punitive damages, including post verdict judicial oversight at the trial and appellate levels, is inherently unfair and must be modified if not superseded altogether. In short, the *Haslip* emphasis on tightening up *procedural* safeguards is unworkable and, according to TXO, therefore supplementary *substantive* rules limiting the award of punitive damages may be imposed. This is a novel basis for invoking heightened substantive due process review by this Court. Before taking Petitioner's invita-

[3]Regardless of whether these policies are legislatively or judicially established or are a combination of the two, they reflect the lawful policy choices of the state. These general policies, as distinguished from their case-by-case applications, must be sustained as long as the minimal rationality test of this Court is satisfied. *See, City of New Orleans v. Duke*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

[4]In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), this Court recognized that substantive due process principles require heightened judicial review in situations outside the context of abortion and reproductive rights. The Court, however, cautioned that the occasions for such extraordinary judicial intervention would be rare. The values so recognized and given special constitutional protection have to be deeply rooted in the traditions and mores of our society. Under this view of substantive due process, *Haislip* exhibits a deference to the long standing authority of the jury to decide punitive damages in the first instance. Petitioners in fact want to discard that tradition.

tion too seriously, however, the Court should look long and hard at how the punitive damage issue is litigated. In CAS's view, the relevant comparison is how the issue is *actually* defended in front of the jury as opposed to how it is *actually* litigated at the post-trial and appellate phases. There is a striking difference between the two stages in many cases and this is frequently the result of litigation strategy or lack thereof on the part of defense counsel. A substantial award of punitive damages therefore does not automatically signify a defect in state law.

CAS suggests that defense counsel frequently default on the punitive damages issue in front of the jury. Defense counsel rarely take full advantage of the right to seek bifurcation on the punitive damages question. In some cases such as the present one, incredibly, they do not seek bifurcation at all.[5] In any event, whether or not the trial is bifurcated, defense counsel in a surprising number of cases choose *not* to present

[5]Although some states now mandate trial bifurcation when punitive damages are sought, *see, e.g.*, O.C.G.A. § 51-12-5.1, most jurisdictions permit bifurcation under a civil practice rule similar to Rule 42(b) of the Federal Rules of Civil Procedure. The advantages of trial bifurcation while well recognized are for some reason not yet widely utilized. 3 J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice*, ¶¶ 12.01 to 12.06 (1992).

In this case, TXO was actually afforded bifurcation as the trial court first handled TXO's declaratory judgment action, and then submitted Alliance's counterclaim for slander of title to the jury. Importantly, however at the second trial, TXO did not avail itself of further procedural safeguards against jury prejudice by requesting that the jury's determination of liability on the counterclaim first be rendered prior to considering the issue of punitive damages. *See*, W.Va. Rule 42(c), W.V.R.C.P., and *State ex rel. Tinsman v. Hott*, 424 S.E.2d 584 (W.Va. 1992)

evidence to the jury in mitigation of punitive damages.[6] Indeed, defense counsel often don't bother to introduce mitigating evidence even when arguing for remittitur to the trial judge who sits as a thirteenth juror with the authority to prevent miscarriages of justice. This pattern of omission or timidity seriously undermines Petitioner's challenge to *Haslip*.

To decide whether a jury has acted in accordance with prevailing law in awarding punitive damages, a reviewing court should examine the trial record with an attentive eye toward the following factors:

1. In jurisdictions where trial bifurcation is not mandatory, did defense counsel ask for bifurcation on the issue of punitive damages?

2. During pretrial discovery, how did the defendant respond to efforts to secure information about the profitability or potential profitability of the alleged course of misconduct? This information would provide an objective basis for assessing what it would take to penalize or deter a defendant for intentional misconduct or conduct undertaken with an awareness of a serious threat of harm to others. If defense counsel elect to litigate the punitive damage question without introducing this information or by actively resisting its discovery, complaints about unfairness have significantly less force. Defense counsel ignore the practical burden of evidentiary production at their peril. The jury, after all, can only decide the punitive damage issue based on evidence made available to it by the litigants.

[6]In context of capital punishment cases, which are always bifurcated on penalty, it is almost *per se* ineffective assistance of counsel to defend against the imposition of the death penalty without introducing evidence in mitigation. *See, e.g., Jones v. Thigpen*, 788 F.2d 1101 (5th Cir.1986); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985). How can defense counsel (when they do the same thing in a case involving a substantial award of punitive damages) argue that the result is due to a deficiency in the law rather than a deficiency in the representation?

3. What was plaintiff's theory for the award of punitive damages at trial? What evidence supported that theory?

4. How did defense counsel respond at trial to plaintiff's evidence in support of the award of punitive damages? For example, did defense counsel elect simply to impeach by cross examination? Or did they introduce contradictory evidence? Did defense counsel pursue a strategy of mitigation and offer testimony about punitive damage verdicts in analogous cases; the range of monetary fines for criminal conduct in the state; or punitive damages awards paid in other cases for the same course of misconduct? Did the defendant at any point cease engaging in the misconduct and take steps to remedy its effects, to advise the public of the risks or otherwise show concern for the interests of third parties, including the plaintiff? If evidence, as described above, was not presented to the jury, what explanation does the defendant have for that strategic choice? The state can only give civil defendants an opportunity to litigate the punitive damage issue before the jury; the state cannot force them to use it wisely.

5. At the post verdict phase, what *additional* evidence, if any, did defense counsel ask the trial judge to consider in deciding whether to reduce the punitive damages award? If *additional* evidence was not offered at this point, why not? If it was, why were the evidence and the arguments based upon it not first presented to the jury. In some cases, the defendant will have made a conscious decision to bypass the jury. In other cases, the explanation may be oversight. Nevertheless, it worth noting that in *criminal* cases, which Petitioner notes in its brief, this type of trial level default has dire consequences. Even when the imposition of the death penalty is at stake, such default has presented a formidable, if not insurmountable, bar to appellate and post conviction

review.[7] Surely, there is nothing procedurally unfair about similarly binding civil defendants to the legal and evidentiary arguments made at the trial level concerning the award of punitive damages.

TXO overstates its attack on *Haslip*, especially when it is realized that civil defendants litigate a far different case at trial than on appeal. It is unreasonable to belittle *Haslip* and its acceptance of traditional state schemes for imposing punitive damages when civil defendants do not aggressively use the procedural and substantive tools available to them to persuade the jury. CAS urges this Court to examine with care the litigation process in the case at hand before it finds fundamental fault with the law. *Haslip* is sound and should be retained without modification.

CAS believes acceptance of Petitioner's approach to punitive damages would have a major — and decidedly negative impact — on product liability litigation against automobile and

[7]In *Wainwright v. Sykes*, 433 U.S. 72 (1977), this Court announced a stronger procedural default rule in habeas corpus cases than previously had been recognized. The point was that a litigant shouldn't be allowed to "sandbag" in state court and then raise new issues in federal habeas corpus proceedings. The assert-it-or-forego-it principle has been reaffirmed by this Court many times since 1977. Recently, in *Coleman v. Thompson*, 111 S.Ct.2546 (1991), the Court applied its procedural default rule in a capital case in which Coleman's attorney failed to file a notice of appeal within the 30 day time limit established by the Virginia Supreme Court Rules. It would be hard to imagine a more hard nosed application of the procedural default rule than in *Coleman*. Yet, this Court said that when the state is under no constitutional obligation to provide representation, the risk of attorney inadvertence or incompetence had to be borne by the client. That argument has force in the context of the TXO case. *See also McLesky v. Zant*, 111 S.Ct. 1454 (1991).

truck manufacturers. A ratio test does offer the enticement of predictability. But it is a predictablity that enables the manufacturer to guage with dismaying accuracy the cost of remedying a defective vehicle against the cost of concealing or denying the existence of the defect. This calculus was central to the jury's determination of punitive damages in *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (1981) and *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984). In these cases, both of which involved highly dangerous gas tank placement, there was evidence of serious corporate misconduct and significant financial benefit to Ford Motor Company resulting from its failure to correct a known defect. Yet, as substantial as the punitive damages awards were in both cases, there is a real question whether the awards had sufficient financial impact on Ford to deny them the profits from their misconduct. In short, while Ford may have lost those cases in a legal sense, its financial calculus may have been vindicated. CAS suggests the use of the ratio test would make it even less likely Ford today would have to answer fully for its wrongdoing.

In a very recent gas tank placement case involving a General Motors pickup truck, the jury awarded $101,000,000 in punitive damages. This verdict came after the jury awarded the plaintiffs $4,241,611.84 in compensatory damages for the full value of the victim's life and $1 for the victim's pain and suffering. *Moseley et. al. v. General Motors Corp. et al.*, State Court of Fulton County, Georgia, Case No. 90-V-6276. Under Georgia law, punitive damages are allowed in pain and suffering but not wrongful death actions. Under TXO's ratio test, therefore, the base for determining punitive damages would be the $1 award for pain and suffering; the $4.24 million verdict reflecting the full value of victim's life would not be considered. Despite the enormity of GM's apparent misconduct, the ratio test would authorize punitive damages in an

amount ranging from $3 to whatever the Petitioner's believe the upper limit on the ratio should be. Such an outcome would conflict with *Haslip's* clear acceptance of traditional state grounds for determining damages. The value of predictability would override deterrence and punishment.

Listed below are some of the key facts supporting the punitive damages award in the Moseley case:

1. The trial was bifurcated as required by Georgia law. In the initial phase of the trial, the jury determined liability on all claims, including the plaintiff's entitlement to punitive damages. At that point, it returned a verdict for compensatory damages only. In the second phase of the trial, the plaintiff can offer additional evidence relating to the amount of punitive damages; the defendant can offer evidence in mitigation. After a second round of argument in *Moseley*, the jury fixed the amount of punitive damages. Despite bifurcation, counsel for GM introduced no evidence at the second phase.

2. In litigation involving the safety of the gas tank placement in GM's pickup trucks, GM did not disclose during discovery in non-*Moseley* cases that it had crash tested 24 trucks between 1981 and 1983 and at least 22 of the 24 trucks had failed the test because the tanks ruptured upon side impact.

3. Plaintiff introduced evidence that went largely uncontradicted about GM's knowledge of the defective placement of the side mounted gas tank (outside the frame) and GM's decision not to recall the trucks or to make the public aware of the concomitant danger of fuel fed fire. Among the key items of evidence that the jury could have weighed in favor of awarding punitive damages against GM:

—GM violated its own internal fuel tank placement standards by failing to provide enough crush space for the tank

and by failing to eliminate puncture producing objects surrounding the tank;

—GM tested the location of the gas tank outside the frame before adopting the side mount design and found that trucks in three of four tests failed;

—GM ignored competitors' brochures promoting the safety of inside the frame gas tank location;

—In 1974, only *one year* after the side mount design is implemented, GM conducted a comparative study of trucks sold prior to 1973 and trucks sold having the side mount design and the data revealed an increase in gas tank leaks after side impacts in models having the side mount design.;

—In 1978, another GM statistical study showed that an inside the frame designed was needed to eliminate "leakers";

—GM engineers reported data to management suggesting that best tank location would be in "the rear" of GM trucks;

—From 1981-83, GM conducted an extensive crash testing program on trucks having side mount design and observed that at least twenty two out of the twenty four trucks tested failed;

—In 1982 GM engineers estimated the costs of moving the gas tank inside the truck frame and the anticipated lead time, but rejected the idea;

—GM sent its expert engineer Ron Elwell to testify in gas tank placement product liability case in May 1983, but did not tell him about the results of the crash tests;

—GM legal teams during 1983, according to trial testimony, instructed engineers to remove sensitive design documents (about side mount tank placement) from their files and to destroy them;

—GM begins adding "stone shields" (plastic liners) to its 1984-87 models, yet does not tell the public that the shields are to help reduce gas tank ruptures due to side impact accidents;

—In 1983 GM engineers tell Ron Elwell that the side mount placement of the gas tanks on GM trucks is "not defensible" and also disclose the results of the twenty-four crash tests, some of which showed ruptured gas tanks looking like "split melons";

—In 1983 GM acknowledges that outside the frame gas tank design is more vulnerable than inside the frame design yet GM does not recall the trucks;

—In 1983 GM plans to move the gas tank inside the truck frame for "added protection in side impacts";

—In 1987 GM notes that inside the frame gas tank placement will "give added protection in side impacts";

—Despite the foregoing evidence concerning the design of its trucks and the pattern of injury and death associated with gas tank ruptures and fuel fed fires, GM does not warn or recall for fifteen years;

—GM engineers told not to put questions about products in writing, and told that question of safety-related defect was a managment decision, not an engineering decision;

—GM sued over one hundred times concerning its side mount tank design, but instead of recalling the trucks, GM confidentially settles most of the cases;

—Statistical studies show that of 250 who people died in GM trucks over 180 would have lived had GM abandoned its side mount gas tank placement;

—GM executives tell jury that customers have no right to know of the dangers disclosed to GM by its own crash testing program or the analyses by GM engineers;

—In responding to NHTSA's recall investigation, GM provides NHTSA with misleading statistical study that purports to show how safe the gas tank design is, but GM has to withdraw study when the Insurance Institute For Highway Safety points out that it is misleading and skews data in GM's favor.

4. General Motors put up few witnesses in its case-in-chief and none at the punitive damages phase of the trial. All but one testified that the accident victim died instantaneously. If the jury had credited this testimony, it would not have been authorized to find any pain and suffering and thus could not have awarded punitive damages. GM basically conceded the wrongful death claim in hopes of avoiding punitive damages. When that strategy failed, GM literally had nothing to say to the jury during the second phase of the case except to argue lamely for mercy. The entire closing argument of GM is reproduced in the appendix. If this argument had been presented in the penalty phase of a death penalty case, it probably would have been deemed ineffective assistance of counsel. This plea for mercy technique is much more common in the defense of punitive damage claims than one might expect. Bear in mind that GM was well aware the jury was going to place a monetary figure on punitive damages and yet did nothing to suggest what an appropriate figure might be.

5. At this juncture, GM has not filed any post trial motion specifying constitutional grounds for reduction of the punitive damages award. Nor has GM at this point indicated whether it might attempt to introduce evidence in support of such a motion.

CONCLUSION

CAS trusts that this profile helps the Court to understand that TXO's harsh view of juries may be unjustified. TXO's desire for predictability is understandable because TXO wants perhaps to know in advance the maximum cost of misconduct. State policies regarding the award of punitive damages reflect quite different concerns. Wrongdoers are required to pay in proportion to the harm done or attempted with heavy consideration being given to the extent of any financial benefit that accrued or was contemplated. *Haslip* should not be modified at this point. The decision reflects practical wisdom. The judgment below should be affirmed.

Respectfully submitted

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APPENDIX

Closing Argument of Counsel for General Motors Corp. in *Moseley, et al. v. General Motors Corp., et al.*

This is the last time I'll stand before you. I'm not going to re-argue the case, you'll be glad to hear. There's nobody that's got anything to do with this case that knows the evidence as well as you do. You've sifted it, sorted it, you've lined it up, you've analyzed it. We, everybody that's had anything to do with this case, we take our hats off to you for working so hard.

At the beginning of this trial I stood here and I said that I believe in the jury system and General Motors believes in the jury system. We believe in the jury system. There is no better way. We believe it is a crushing blow that you've delivered us. It's tough — let me say this. It's a crushing blow, we respect it, we accept it. It's tough to stand here in front of more people than I like to know are watching and to say that your decision is going to make us a better company, but it will.

We're going to find an independent lawyer to look into some of the document things and let the chips fall where they may, and if somebody finds that a lawyer did something he shouldn't have done, he's history and you can take that to the bank.

We're going to sit down with the people at N.H.T.S.A. and spend as much time as it takes and go over — we never had a strap thing like this before, but we respect your decision and we're going to immediately see what can be done about that.

Our company is changing, as a lot of you know. There's been talk about corporate mentality. You sent a message, we have got the message, we have got the message and I'm going to say again what you said to us is going to make us a better company, and it ought to.

There isn't any sense in me standing here for fifteen or twenty minutes. It isn't needed. You know, I can see by your faces you know this case, you don't need any more talking by Fred Bartlit or General Motors; you've got it. I'm not going to do that. I'm going to say that we have the deepest, deepest sympathy for this tragedy, the deepest sympathy for the Moseleys.

I want to thank the jury for your tireless service. You have the gratitude — I'm not going to say again the things I said about what you all gave up, and it's real easy when you have a few disagreements to go home and say what the heck, I'll give up. Nobody did that. Everybody stood by their positions.

What I'm going to say about the amount, I guess what I'm going to say is we're going to put ourselves, like we have from the beginning, in the hands of the twelve people that know more about this case than any other twelve people.

And I guess that's it. I feel like — I've been doing this for a number of years and I feel like I ought to have some great inspiring statement to make, but I think that the inspiring statement is the hard work you've done. There's nothing I can do. Abraham Lincoln said there's nothing we can add to it or detract from it, and we thank you for that and, you know, we put ourselves in your hands, where we've been from the beginning.

Thank you.